In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-620

SAMUEL NEIDORF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the government's action for money damages is "founded upon a tort" within the meaning of 28 U.S.C. 2415(b)[1] and therefore barred because brought more than three years after the cause of

[1]28 U.S.C. 2415 provides in pertinent part:

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * *.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for

action accrued. The government's complaint was filed in February 1972, more than three years but less than six years after the cause of action was deemed to have accrued for purposes of the statute of limitations.[2] Accordingly the action was timely if, as the court of appeals held, it was "founded upon any contract express or implied in law or fact * * *." 28 U.S.C. 2415(a).

Petitioners were officers and directors of Hermetic Seal Products Co., a government contractor. In its complaint, the government alleged that while renegotiation claims for excessive profits had been pending against Hermetic Seal, petitioners had caused that corporation to make dividend distributions of $2,025,000, and other distributions of $910,000, with the intention of preventing the government from enforcing those claims.[3] The government further alleged that those distributions rendered Hermetic

---

money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues * * *.

[2]Before the enactment of 28 U.S.C. 2415 on July 18, 1966, suits brought by the United States for money damages were not subject to any statute of limitations. *United States* v. *Thompson*, 98 U.S. 486. The government's cause of action in fact accrued prior to 1966, but 28 U.S.C. 2415(g) provides that actions accruing "prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment * * *."

[3]The United States brought a separate suit against two other officers and directors of Hermetic Seal in the District of New Jersey. *United States* v. *Klebanoff and Gutkin*, Civil Action No. 216-72. In September 1973 the district court there entered summary judgments in favor of defendants, reciting that "defendant[s] * * * [are] entitled to summary judgment by reason of *res judicata* and *collateral estoppel* arising from the judgments entered on May 21, 1973, by the United States District Court for the Central District of California" in the present case. On October 20, 1975, after the Ninth Circuit's reversal here, the Third Circuit vacated and remanded that case to the district court for a trial on the merits.

Seal insolvent and without sufficient assets to satisfy the government's claims. The complaint additionally recited that on the basis of its renegotiation claims the government had obtained judgments against Hermetic Seal totaling $975,000,[4] that, except for collection of $1,500, execution on the judgments had been returned unsatisfied, and that Hermetic Seal had since gone out of business.

On the basis of the facts alleged in the government's complaint, the district court held that the action was founded upon a tort and therefore barred by the three-year statute of limitations provided for such actions by 28 U.S.C. 2415(b).[5] The court of appeals reversed, holding that since at least two of the government's causes of action against petitioners are quasi-contractual, *i.e.*, the right of a creditor to set aside a fraudulent conveyance and the right of a creditor of a corporation to recover a distribution that rendered the corporation insolvent, the government's suit was governed by the six-year limitation period of 28 U.S.C. 2415(a) (Pet. App. 5-10). Judge Chambers filed a concurring and dissenting opinion, "agree[ing] with the majority that insofar as the complaint states a cause of action against Neidorf and Glickman as shareholders, the action is founded upon quasi-contract and the six-year limitations period applies" (Pet. App. 10-11), but concluding that the shorter statute of limitations was applicable to the action to set aside a fraudulent conveyance (*id.* at 12).

---

[4]The judgments were affirmed on appeal, *Hermetic Seal Products Co.* v. *United States*, 307 F.2d 809 (C.A. 1), and this Court denied certiorari, 371 U.S. 954.

[5]District Court Findings of Fact and Conclusions of Law, Court of Appeals Rec. 209-211.

1. In order to place actions by the United States on similar footing with those by private litigants, Congress passed a statute of limitations in 1966 for government suits for money damages, 28 U.S.C. 2415. See, *e.g.*, S. Rep. No. 1328, 89th Cong., 2d Sess. 2, 7 (1966). In so doing, Congress made the limitation period depend upon the nature of the government's suit at common law. As the court of appeals noted, "[t]hus, whenever the United States sues for damages, the substance of the claims must be characterized for purposes of section 2415 as sounding in either tort, contract or quasi-contract" (Pet. App. 9).[6]

Here the court of appeals, in a scholarly opinion, correctly held that "[b]oth the liability of the transferee of a fraudulent conveyance and the liability of a shareholder to a creditor of the corporation are based not upon tort but upon quasi-contract" (Pet. App. 6). See also *United States* v. *Franklin National Bank*, 376 F. Supp. 378 (E.D. N.Y.), where the court applied the six-year limitations period of Section 2415(a) to an action brought by the United States to set aside a fraudulent conveyance.[7] There are no reported decisions to the contrary.

The legislative history of Section 2415(a) demonstrates that suits based upon quasi-contractual obligations are

---

[6]The court of appeals further noted (Pet. App. 9-10, n. 6):

> The characterization of the claim as one in tort, contract or quasi-contract must also be a matter of federal law since the uniform limitations established by the statute would be compromised if limitations varied according to the labels attached to identical causes of action by different states. *Cf. United States* v. *Nardello*, 353 U.S. 286, 293-95 (1969).

[7]See also *United States* v. *Limbs*, 524 F.2d 799 (C.A. 9), where the Ninth Circuit held that a suit by the government under 5 U.S.C. 8132 for restitution of compensation benefits is a quasi-contractual claim that may be brought at any time within six years.

"founded upon [a] contract express or implied" and therefore subject to the six-year limitation period. As Assistant Attorney General Douglas testified (Hearing on H.R. 13650, H.R. 13651, H.R. 13652 and H.R. 14182 before Subcommittee No. 2 of the House Committee on the Judiciary, 89th Cong., 2d Sess. 7 (1966)):

> The six-year limitation would apply to all types of contracts, express or implied in law or in fact. This wording is intended to include quasi-contracts involving unjust enrichment wherein the debtor receives money from the Government to which he is not entitled, regardless of whether the payment is made pursuant to agreement or as a gratuity.

See also H.R. Rep. No. 1534, 89th Cong., 2d Sess. 4, 11 (1966); S. Rep. No. 1328, *supra*; 112 Cong. Rec. 6876 (1966) (remarks of Senator Ervin).

Petitioners contend that 28 U.S.C. 2415 should be interpreted in a manner consistent with what they describe as the majority rule in the states, *i.e.*, that an action to set aside fraudulent conveyance is an action for fraud and thus "founded upon a tort" (Pet. 8, 12). But while it is true that many jurisdictions treat actions to set aside fraudulent conveyances as actions for fraud for statute of limitations purposes, those jurisdictions generally have a specific statute of limitations for fraud actions, in addition to their statutes of limitations for actions based upon either contract or tort. See *United States* v. *Franklin National Bank, supra,* 376 F. Supp. at 383. That is not the case here; the federal statute speaks only of tort and contract, and the court of appeals reasonably concluded that a contract creditor's action for fraudulent conveyance was more closely analogous to a suit in contract than to one in tort.

2. The decision below is also supported by an important practical consideration. The basis for a suit against a debtor-corporation's transferees is not fully established

until a judgment is returned unsatisfied against the corporate debtor. This often could occur more than three years after the fraudulent conveyance. Application of the three-year statute of limitations might force the government in many cases prematurely to join suspected transferees as parties defendant in suits against the corporation. Such premature joinder would impose an additional burden on the government, innocent transferees, and the courts.

It is therefore respectfuliy submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.